THE

Madras Weekly Notes.

1911] **Sunday, December 3, 1911** [1911

THE DECISIONS IN [1911] 2 M. W. N. 515 and 516.

These two cases raise a question of great importance with reference to partition suits which are very common in this country. The precise point for determination was whether the expression '*final order*' in Sec. 2, cl. (15) of the Stamp Act, means the final decree in a partition suit or an order made by the court in execution of the decree for partition. In the case in [1911] 2 M. W. N. 515, Justice Wallis held that it must apply only to an order in execution. In [1911] 2 M.W.N. 516, Justice Bakewell who had considerable experience of the practice in the Registrar's office on the original side of the High Court, expressly dissented from the above view and agreeing with the decision in 29 Bom. 366 (F. B.) held that the final order means only the final decree in the suit. In the opinion of Justice Bakewell the final decree 'effects an actual partition of the property among the parties and is therefore the final order in the suit effecting a partition, and is accordingly chargeable with duty as an instrument of partition. As his Lordship observed "A final order of this kind will be analogous to a final order of the Collector under S. 265, C. P. C. (1882) or S. 54, C. P. C. (1908), effecting a partition of an undivided estate paying revenue to Government. Further proceedings on such a final order will be for delivery of possession merely and in execution and will not be for effecting a partition." With great deference to Wallis, J., we are of opinion that the view taken by Bakewell, J. is the correct one. It is rather unfortunate that Wallis, J. did not think it necessary to give any reasons for his decision and contented himself with observing that the contrary view 'would give rise to the 'difficulties pointed out in Mr. Jagannatha Iyer's commentary.' We shall consider these difficulties in our next issue.

WEEK'S CASES.

27th November, 1911.

Benson, J. and A. Rahim, J.

Cr. R. Case No. 500 of 1911.

Possession of a receiver appointed by the Court under section 145, Crim. Pro. Code, must be deemed to be possession of the party rightfully entitled to the property for all purposes, and not merely for the purpose of limitation as decided in 26 Madras 417.

S. A. No. 876 of 1910.

The plaintiffs and defendants are owners of two villages irrigated from the same irrigation source. The defendants, owners of the lands lower down, obtained an

order of Government permitting them to use the water if the silt in the channel were removed: The plaintiffs thereupon sued for an injunction against the defendants to restrain them from using the water. *Held* no suit for an injunction would lie unless the defendants have used the water and actual damage has been caused thereby.

28th November, 1911.

Benson, J. and A. Rahim, J

S. A. No. 461 of 1910.

Where there was an agreement that payment of consideration recited in a sale-deed of certain properties should be a condition precedent to the sale itself taking any effect, a suit for possession by a vendee, when he has not paid the consideration will not lie; it is not open to an appellate court to grant him the relief, when he offers to pay the amount in that Court.

S. A. No. 703 of 1910.

A female member of a tarwad sent a sum of Rs. 1,000 and a vakalat by her agent to a Vakil. The Vakil deposited the amount in Court but withdrew it later on the other side refusing to accept the same. The Vakil then paid back the amount to the agent who absconded with the money. The female brings this suit to recover the amount from the Vakil and the agent is also made a party. *Held* that the Vakil was not guilty of negligence and hence not liable for the amount. That the agent was originally entrusted with the vakalat and the money was sufficient representation to the Vakil that he was her agent. That the Karnavan also knew of the payment and did not object proves the *bona fides* of the Vakil.

S. A. No. 929 of 1910.

Where it appears that a mortgagor had to satisfy a sub-mortgage created by his mortgagee (whom he has satisfied by payment), and where the sub-mortgagee had obtained a decree for sale, that of itself, will not entitle the mortgagor to bring a suit for contribution against his mortgagee, unless the mortgagor actually pays up the decree amount; but when he pays the amount due under the decree subsequent to the institution of the suit against his mortgagee the suit need not be dismissed but he may be asked to amend his plaint, and the suit can then be treated as one for contribution.

Sundrier, J. and Spencer, J.

Cr. M. P. No. 343 of 1911.

Where the complainant before the Village Munsiff, is the brother of the latter, *held* that alone was a good ground for transfer of a case from his file to that of the sub-magistrate.

S. A. No. 1017 of 1910.

In a case of wrongful attachment of A's property for arrears of revenue due by B, *held* that malice need not be proved to entitle A to damages from the Village Munsiff who committed the tort; and the Secretary of State for India should not have been made a party as the plaintiff had no cause of action against him.

29th November, 1911.

Benson, J. and A. Rahim, J.

C. M. S. A. No. 24 of 1911.

Where an application for execution was struck off and nothing further appears, it must be deemed to be not pending.

A subsequent application can only be treated as a fresh application. Where

such application was put in for sale of the property attached by a previous application put in 8 years ago and struck off, it must be held to be barred by limitation.

The fact that the delay was caused by the pendency of a civil suit to determine the right of the judgment debtor to the property attached will not save limitation as the decree-holder could have kept the original application alive by some act of his.

30th November, 1911.

Sundara Aiyer, J. and Spencer, J.

S. A. No. 1167 of 1910.

In a suit for partition of an item of property (a vacant house-site) by the widow of a member of a Hindu family which was divided in respect of all items of property except the suit item, it is not open to the court, to decree joint possession to the widow with the other members of the family especially when the vacant site was built upon by other members at their own cost. The proper course is to declare her right to a share in the vacant house-site, and then permit her to work out her right by a suit for partition.

S. A. No. 1283 of 1910.

In a suit to recover possession of a vacant site by an absent owner, it was proved in evidence that the defendant had been tying his cattle on the vacant site for more than twelve years. *Held* that this of itself is not sufficient to constitute adverse possession. Possession becomes adverse only when it was effective. Where the acts constituting such possession were not done to the knowledge of the owner, it is mere fugitive posse ssion, and a defendant connot base a title by prescription upon such possession.

S. A. No. 1284 of 1910.

In a partition deed between brothers a piece of land was given to the mother for life and to the three sisters for *pasupu cumkuma* (pin money) permanently ; the mother died; one of the sisters brought a suit to recover her share in the properties so given. The Lower Courts decreed her claim; on appeal it was contended that the sister cannot maintain the suit as she was not a party to the partition and she cannot take advantage of any provision in the partition deed, as it was not communicated to her.

Held that she can maintain a suit for her share of the properties given ; the English Text writers clearly lay down certain exceptions to the rule that none but parties to a contract can sue to enforce it; one of such exception is where a benefit is given to a person in a contract to which he was not a party. In India this rule is capable of great relaxation. In family partition, it is usual to provide for the maintenance of females, etc., who are not entitled to a share. If such persons cannot maintain a suit to recover maintenance, etc., it would lead to anamoly. The plaintiff can therefore in this case maintain a suit, and the decisions of the lower court are right.

S. A. No. 1322 of 1910.

In a suit by the plaintiffs to declare their right to certain properties alienated by the 1st defendant (a Hindu female) as guardian of the 2nd defendant (her grand daughter) as if it belonged to her, while in fact, it belonged to the 1st defendant's husband to which the plaintiffs are therefore entitled to succeed, it was contended that as there is no direct alienation by the Hindu widow the plaintiff

cannot maintain a suit under section 42 of the Specific Relief Act.

Held that the fact that the 1st defendant made the alienation as guardian of the 2nd defendant, and thus tacitly acquiesced in the 2nd defendant's statement that the property is hers, when in fact it is the property of the 1st defendant's husband and creates evidence against plaintiffs makes Section 42 of the Specific Relief Act applicable and the suit can therefore be maintained.

Benson, J.

C. R. P. No. 505 of 1910.

Where the properties of the maker of a pro-note were assigned to A and B, the promisee cannot make A alone liable.

1st December, 1911.

Sundra Aiyer, J. and Spencer, J.

S. A. No. 1403 of 1910.

Where the High Court is of opinion that there was some confusion in the mind of the Lower Appellate Court, with regard to some piece of evidence, the High Court would interfere in Second Appeal even though the question may be apparently only one of fact.

S. A. No. 1541 of 1910.

Where a person has a mere possessory title, he has sufficent interest in the property so as to enable him to lease it out to other persons. Persons claiming under such a lease can also maintain a suit for mesne profits against a mere stranger.

Ayling, J.

Cr. R. No. 515 of 1911.

Information was received by the Sub-Magistrate that there was a revolver in the house of A. A was present in the Court and an orderly was immediately sent with him to search the house. A's mother produced a revolver from an almirah the key of which was in her possession. A's father was an Honorary Magistrate who was exempted from a license. A was the only adult male member in the family and he was held liable under the Arms Act for not taking out a license.